No. 86- 87-161

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1986

JOHNNY COPELAND,

Petitioner,

– – v. –

RICHARD L. DUGGER,

Secretary, Department of
Corrections, State of Florida,

and

STATE OF FLORIDA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA WITH APPENDIX

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Question Presented

Petitioner Johnny Copeland was sentenced to death by the 10–2 vote of a Florida jury that was precluded from considering powerful non-statutory mitigating circumstances. The Court is thus presented with the following issues:

a) Whether Copeland's capital sentence must be reversed where the jury was precluded from considering such mitigating circumstances and was given instructions virtually identical to those unanimously found unconstitutional by this Court in *Hitchcock v. Dugger*, 107 S. Ct. 1826 (1987).

b) Whether the prevailing confusion in Florida as to what mitigating circumstances could be considered by sentencing juries, which persisted until the Florida death penalty statute was amended after Copeland's trial to conform with this Court's holding in *Lockett v. Ohio*, 438 U.S. 536 (1978), entitles Copeland to a new sentencing proceeding.

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OCTOBER TERM, 1986

No. 86-

JOHNNY COPELAND,

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RICHARD L. DUGGER,

Secretary, Department of Corrections, State of Florida,

and

STATE OF FLORIDA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioner Johnny Copeland respectfully requests that a writ of certiorari issue to review the decision of the Supreme Court of Florida, entered on April 9, 1987, which denied him post-conviction relief.

Opinions Below

The opinion of the Supreme Court of Florida affirming Copeland's convictions and death sentence on direct appeal is reported as *Copeland v. State*, 457 So.2d 1012 (Fla. 1984). It is annexed as Appendix A.

The opinion of the Supreme Court of Florida denying Copeland's petition for a writ of habeas corpus and affirming the denial of his motion for post-conviction relief pursuant to Fla. R. Crim. Pro. 3.850 is reported as *Copeland v. Wainwright*, 505 So.2d 425 (Fla. 1987). It is annexed as Appendix B.

Jurisdiction

The judgment of the Supreme Court of Florida was entered on April 9, 1987.

On May 26, 1987, Justice Powell ordered that the time for filing this petition for writ of certiorari be extended to and including July 8, 1987.

The jurisdiction of this Court to review the judgment of the Supreme Court of Florida is invoked under 28 U.S.C. § 1254(1).

Statute Involved

Fla. Stat. § 921.141 is annexed as Appendix C.

Statement of the Case

Amidst an atmosphere charged with racial hostility, petitioner Copeland, a black man from Tallahassee with an I.Q. of 62, was tried in a small, rural Florida county for the rape and murder of Sheila Porter, a 19-year old white woman who had lived in the county all her life with her parents and eleven brothers and sisters.

A community survey showed that 99% of the 5,878 county residents eligible for jury service were familiar with the details of the crime. All of the sitting jurors and both alternates admitted knowledge of the crime. Considerably more than half of the jury pool was disqualified for prejudice upon admitting a direct family relationship, or some other connection, relationship or friendship with the victim or her family. Although his identically-situated co-defendant, Frank Smith, was granted a change of venue, Copeland's repeated motions for change of venue were denied by the trial judge.

On May 24, 1979, Copeland was convicted of robbery, kidnapping, sexual battery, and first-degree murder, based almost entirely upon statements he made to police before being given access to counsel. Copeland's "liability rest[ed] upon the felony-murder rule and not on evidence that he participated in premeditated murder." *Copeland v. State*, 457 So.2d at 1019, App. A at 15.

At Copeland's sentencing proceeding, the trial judge instructed the jurors that "the mitigating circumstances which you may consider" were limited to those specifically enumerated in Florida's death penalty statute, Fla. Stat. § 921.141. That statute was amended -- three months after Copeland's

sentencing hearing -- to permit consideration of non-statutory mitigating circumstances. Fla. Laws, Ch. 79-353 (1979).

On May 25, 1979, the jury -- which had also been exposed to repeated statements by the prosecutor and judge diminishing the importance of its role in imposing the death sentence -- recommended by a 10-2 vote that the court impose the death sentence. The trial judge, who considered only those mitigating circumstances enumerated in the death penalty statute, imposed the death penalty on September 10, 1979.

The facts adduced at the trial establish that on December 12, 1978, Copeland accompanied two acquaintances, Frank Smith and Victor Hall, to the Medart Junior Food Store. The three men robbed the market and abducted Porter. Smith told Copeland to drive her to a nearby motel. There she was raped.

The men then drove Porter to a nearby wooded area. Smith ordered Porter out of the car and led her into the woods. Copeland caught up with Smith and Porter as they walked into the woods out of the sight of Hall, who was waiting in the car. Once in a remote section of the woods, Smith commanded Porter to kneel down and then shot her three times in the back of the head, killing her.

On September 13, 1984, the Supreme Court of Florida affirmed the convictions and death sentence, with two justices dissenting. *Copeland v. State*, 457 So.2d 1012 (Fla. 1984) (App. A). This Court denied certiorari, with two Justices dissenting, on April 15, 1985. *Copeland v. Florida*, 471 U.S. 1030 (1985).

The Governor of Florida signed a death warrant scheduling Copeland's execution for October 21, 1986.

On October 14, 1986, Copeland filed a motion pursuant to Fla. R. Crim. Pro. 3.850 with the trial court, and a petition for an original writ of habeas corpus and an application for a stay of execution with the Florida Supreme Court. Copeland also filed an application with Justice Powell pursuant to 28 U.S.C. § 1651 seeking a stay of execution. (No. A-853, October 15, 1986).

The Rule 3.850 motion was denied by the trial court on October 15, 1986 and Copeland immediately filed a notice of appeal to the Florida Supreme Court.

The Florida Supreme Court heard oral argument and granted a stay of execution on October 16, 1986, requesting both sides to brief the issues raised in the habeas corpus petition and in the appeal from the denial of the Rule 3.850 motion.

On April 9, 1987, the Florida Supreme Court issued an opinion denying Copeland's petition for habeas corpus, affirming the denial of his Rule 3.850 motion, and dissolving the previously granted stay of execution. *Copeland v. Wainwright*, 505 So.2d 425 (Fla. 1987) (App. B). Copeland requests that this Court issue a writ of certiorari to review this decision.

Brief Summary of Argument

The facts of this case raise several very serious issues as to whether there has been a denial of Copeland's basic right to trial by a fair and impartial jury under *Irvin v. Dowd*, 366

U.S. 717 (1961), and *Sheppard v. Maxwell*, 384 U.S. 333 (1966), a denial of Copeland's Eighth Amendment rights under *Tison v. Arizona*, 107 S. Ct. 1714 (1987), and *Caldwell v. Mississippi*, 472 U.S. 320 (1985), or a denial of Copeland's Fifth and Sixth Amendment rights arising from the manner in which statements were taken from him. Since, however, these issues would profit from further factual development, Copeland will pursue these claims, if necessary, by way of federal habeas corpus. The issue raised in this petition, however, is in a different posture and should be decided now.

Although Copeland had persuasive mitigating evidence to present, his sentencing jury was instructed not to consider any mitigating circumstances not specifically enumerated in the Florida death penalty statute, in violation of *Lockett v. Ohio*, 438 U.S. 586 (1978). Copeland's jury instructions were indistinguishable from those that this Court held unconstitutional in *Hitchcock v. Dugger*, 107 S. Ct. 1821 (1987). *Hitchcock*, decided two weeks after the Florida Supreme Court's decision denying Copeland post-conviction relief, clearly shows that Florida's ruling misinterpreted the mandate of *Lockett*.

The procedural bar invoked by the Florida Supreme Court -- that Copeland failed to object to the trial judge's instructions despite the fact that his trial occurred after the decision in *Songer v. State*, 365 So.2d 696 (Fla. 1978), which purportedly clarified Florida law -- is untenable. In fact, *Songer* did not clarify the law but rather upheld the very instructions that were given to Copeland's jury and that *Hitchcock* ultimately held to be unconstitutional. The confusion in Florida law was not alleviated until the Florida legislature amended the state's death penalty statute to permit

the sentencing jury to consider all mitigating circumstances. Fla. Laws, Ch. 79-353 (1979). Since this did not occur until three months after Copeland's trial, he is entitled to a new sentencing in light of this Court's ruling in *Hitchcock*.

REASONS FOR GRANTING THE WRIT

I

COPELAND WAS DENIED A RELIABLE INDIVIDUALIZED SENTENCING DETERMINATION WHEN THE JURY WAS NOT PERMITTED TO CONSIDER NON-STATUTORY MITIGATING CIRCUMSTANCES

At the outset of Copeland's sentencing proceeding, the trial judge stated to the jury: "At the conclusion of the taking of evidence and after argument of counsel, you will be instructed on the factors in aggravation and mitigation *that you may consider*." (R. 2136) (emphasis added) After the evidence was presented, the judge instructed the jury as follows:

> Should you find sufficient of these aggravating circumstances to exist, it will then be your duty to determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances found to exist. *The mitigating circumstances which you may consider if established by the evidence are these* . . . . (R. 2199; 480) (emphasis added)

He then read the seven mitigating circumstances enumerated in the Florida death penalty statute, Fla. Stat. § 921.141(6) (App. C), to the jury.

Similarly, in sentencing Copeland to death, the trial judge

restricted his consideration to those mitigating circumstances enumerated in the statute. In the section of the "Findings of the Court Regarding Death Sentence" pertaining to mitigating circumstances, the trial judge wrote: "The Court finds that the mitigating circumstances enumerated in [Fla. Stat. §] 921.141(6)(a)(b)(c)(d)(e) and (f) do not apply . . . ." (R. 515) The only mitigating circumstance that the court found applicable was Fla. Stat. § 921.141(6)(g), which relates to the young age of the defendant. (R. 516) The sentencing memorandum thus reflects the trial judge's assumption that the only mitigating circumstances he could consider were those enumerated in the death penalty statute.

This Court's Decision in *Hitchcock v. Dugger* Entitles Copeland to a New Sentencing Proceeding

This Court has held on numerous occasions that a capital sentencer may not "refuse to consider or be precluded from considering any relevant mitigating evidence." *Hitchcock v. Dugger*, 107 S. Ct. 1821 (1987); *Skipper v. South Carolina*, 106 S. Ct. 1669, 1670–71 (1986); *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

In *Hitchcock*, decided two weeks after the Florida Supreme Court decision below, this Court held that a sentencing proceeding conducted pursuant to the same statute that was in effect at the time of Copeland's trial had unconstitutionally precluded consideration of non-statutory mitigating circumstances and had thereby rendered the resulting death sentence invalid. In light of *Hitchcock*, Copeland's death sentence must be vacated and a new sentencing proceeding held.

This Court in *Hitchcock* did not need to reach the question of whether the Florida death penalty statute actually prohibited sentencers from considering non-statutory mitigating circumstances, because it found that the trial judge had assumed such a prohibition and instructed the jury accordingly. The trial judge told Hitchcock's jurors that he would instruct them on the factors in aggravation and mitigation "that you may consider under our law," and that "the mitigating circumstances which you may consider shall be the following . . ." (listing the statutory mitigating circumstances). *Hitchcock*, 107 S. Ct. at 1824. These instructions were virtually identical to those given to Copeland's sentencing jury. Similarly, the trial judge in *Hitchcock*, like the trial judge in Copeland's sentencing proceeding, restricted his own consideration of mitigating circumstances to those "enumerated in Florida Statute 921.141(6)." *Id.*[1]

Moreover, as this Court noted in *Hitchcock*, the Florida statute had frequently been construed as precluding consideration of non-statutory mitigating circumstances. 107 S. Ct. at 1823. The Florida Legislature ultimately removed the phrase "as enumerated in [the statutory list]" from the provisions requiring the advisory jury and the sentencing judge to consider mitigating circumstances. Fla. Laws, Ch. 79-353 (1979). It did so explicitly to bring "Florida law in line with *Lockett*." *Senate Staff Analysis and Economic Impact Statement*, Senate Bill 523 (May 9, 1979). However, this change in the

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[1] Thus, even if the Florida Supreme Court were correct in its statement, 505 So.2d at 427, App. B at 4, that Copeland was given a full opportunity to put non-statutory mitigating circumstances into evidence (which petitioner does not concede), this point is irrelevant since the jury and judge felt themselves bound *not to consider* such evidence.

statute was not made until July 1979, three months after Copeland's trial. Copeland's sentencing recommendation was therefore tainted by the same constitutionally defective jury instructions struck down in *Hitchcock*, and he is entitled to a new sentencing hearing.

The Florida Supreme Court Erred in Finding Copeland Waived His *Lockett* Claim

In reaching the contrary conclusion, the Florida Supreme Court stated that Copeland had waived his *Lockett* claim by not raising it at trial. This holding was premised exclusively on the court's conclusion, 505 So.2d at 426, App. B at 4, that ". . . at the time of appellant's trial and sentencing, any confusion in the law had been resolved and the matter clarified" by *Songer v. State*, 365 So.2d 696 (Fla. 1978), *cert. denied*, 441 U.S. 956 (1979).[2] The court concluded, therefore, that *Songer* provided a clear basis for an objection to Copeland's jury instructions, and that Copeland's failure to raise such an objection constituted a waiver.

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[2] The Florida Supreme Court's decision that *Songer* cured any potential *Lockett* defect in the Florida statutory scheme was not a decision based on an "adequate and independent" state procedural ground. *See Michigan v. Long*, 463 U.S. 1032, 1038 (1983). Rather, its procedural ruling was predicated on its mistaken conclusion that *Songer* cured *federal constitutional infirmities* then inhering in Florida law. *See Ake v. Oklahoma*, 470 U.S. 68, 75 (1985) ("when resolution of the state procedural law question depends upon a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law").

The Florida Supreme Court's conclusion that *Songer* "clarified" the law is wholly at odds with this Court's unanimous holding in *Hitchcock*. Although the *Songer* decision stated that all mitigating circumstances should be considered, it upheld the very jury instructions that this Court found in *Hitchcock* to have misled lawyers, judges and juries into believing that non-statutory mitigating circumstances were barred from consideration.[3] Thus, rather than clarifying Florida law, *Songer* merely perpetuated the existing confusion.

That confusion persisted until July, 1979, when the Florida death penalty statute was amended to permit consideration of all mitigating evidence, statutory and non-statutory. Because Copeland's sentencing took place before the statutory clarification, Copeland is entitled, as was Hitchcock, to a reliable, individualized sentencing determination consistent with this Court's mandate in *Lockett*.[4]

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[3] The trial court in *Songer* had instructed the jury that its recommendation should be "based upon . . . whether sufficient mitigating circumstances exist, as hereinafter enumerated [in the statute]," and that "mitigating circumstances by statute are: [the ones listed in the statute]." *See* Excerpts from *Songer* Jury Instructions, annexed as Appendix D. On appeal, the Florida Supreme Court upheld *Songer's* conviction, ruling that these instructions would be understood by the jury as permitting consideration of non-statutory mitigating circumstances -- the precise conclusion rejected by this Court in *Hitchcock*.

[4] Our review of Florida capital cases decided between *Songer* and the statutory amendment suggests that such an application of *Hitchcock* would apply at most to eight cases other than this one.

Copeland's Sentencing Jury Was Precluded from Considering Significant Mitigating Evidence

The non-statutory mitigating evidence that Copeland could have and surely would have presented is powerful. Copeland, who is severely mentally retarded, grew up in extreme poverty, hunger, and family instability. He endured considerable violence during his youth, including beatings and sexual assaults by his father and uncle. A polio-induced fever at the age of four, combined with numerous head injuries stemming from beatings, automobile accidents and suicide attempts, resulted in organic brain damage. Copeland has also suffered numerous and persistent psychotic episodes throughout his life. *See* Declaration of Dorothy Otnow Lewis, M.D., annexed as Appendix E.[5] Finally, despite his severe mental retardation, Copeland has applied himself productively in prison by learning how to read and write, evidencing his potential for rehabilitation and ordered social behavior. *See Skipper v. South Carolina*, 106 S. Ct. 1669 (1986) (capital defendant entitled to show in mitigation that he had earned a high school diploma in prison).

Copeland had a constitutional right to present and to have his jury consider all of these mitigating circumstances. Because the trial judge's instructions explicitly precluded such consideration, Copeland's death sentence should be vacated in accordance with this Court's ruling in *Hitchcock*.

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[5] Dr. Lewis' Declaration was submitted in Copeland's post-conviction proceedings below, and is a part of the appellate record.

Conclusion

The decision of the Supreme Court of Florida should be reversed insofar as it left undisturbed the sentence of death imposed upon Copeland.

Respectfully submitted,

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Appendix A

Copeland v. *State*, 457 So.2d 1012 (Fla. 1984)

Johnny COPELAND, Appellant,

v.

STATE of Florida, Appellee.

No. 57788.

Supreme Court of Florida.

Sept. 13, 1984.

Rehearing Denied Nov. 15, 1984.

Clifford L. Davis, Tallahassee, for appellant.

Jim Smith, Atty. Gen. and David P. Gauldin, Asst. Atty. Gen., Tallahassee, for appellee.

PER CURIAM.

Johnny Copeland appeals his convictions for first-degree murder, kidnapping, robbery, and sexual battery. For the capital felony of first-degree murder the judge sentenced appellant to death, thus vesting this Court with jurisdiction of the appeal. Art. V, § 3(b)(1), Fla. Const. The trial court imposed

separate sentences of life imprisonment for each of the other three crimes.

The evidence at trial showed that during the night of Tuesday, December 12, 1978, Sheila Porter, who was nineteen years of age, disappeared from her job as a cashier at the Junior Food Store in Medart, in Wakulla County. At shortly after eleven o'clock that night, the store was found to be unattended and unlocked. Money was missing from the cash register. Shortly before Sheila Porter's disappearance was discovered, several witnesses who had been at the store saw a large white car -- identified by one of them as a nine- or ten-year-old Chrysler Newport -- with two or three black men inside parked in front of the store.

On Wednesday, December 13, an informant, having heard on television of the possible abduction and a description of the car, told police that he had seen such a car in the possession of Frank Smith, that appellant Johnny Copeland was with Smith, and that later that day he had seen the car again but it had been painted black. This informant was one of the state's witnesses at trial. In response to this information, an investigator from the Wakulla County Sheriff's Office contacted Smith and appellant and asked them to accompany him to his headquarters. The investigator who conducted the interviews testified at the trial. In his first statement appellant denied any participation in the crime, stated that he had spent the previous evening visiting family members, and denied helping Smith paint his car black. Later he admitted that he

had helped paint the car black. After being at the sheriff's office for more than nine hours, appellant was released early in the morning of Thursday, December 14.

After receiving further information linking Frank Smith's car to the scene of the suspected abduction, sheriff's deputies arrested appellant at 4:00 a.m. on Friday, December 15. In the interrogation that followed, he said that he had given in to Frank Smith's demand that he help him with a robbery. He said that Smith came to his home, that he went with Smith in Smith's car, and that along the way they picked up Victor Hall and another man whom appellant did not know and could not identify because he wore a mask. Appellant said that they drove to the convenience store in Medart and that he went in and performed the robbery by threatening the girl with a knife. They abducted the girl and returned to appellant's house where he got his own car. Then, appellant's statement continued, they went to a motel just outside Tallahassee where Smith, Hall, and the masked man raped the girl. Then, taking appellant's car, Smith, Hall, and appellant took the victim to a wooded area outside Tallahassee where Smith shot her.

Appellant took investigating officers to the vicinity of the murder. As they tried to locate the body, appellant said that it was Smith and the masked man who took the victim from the car into the woods. After having been shown the general vicinity of the murder by both appellant and Smith independently, the police located Sheila Porter's body by aerial search on Friday, December 15. A pathologist examined the body and

determined that the victim had been shot three times in the head. The genital area of the body had been bruised. The bullets removed from the body were determined to be .25 caliber bullets. Three shell casings were found near the body and were determined to be Federal brand .25 caliber semi-automatic pistol ammunition.

Police investigators interviewed appellant again on the day following the discovery of the body. This time appellant said that there had been no masked man, but that the remainder of his previous statement was true. In a later statement appellant again changed his story, saying that he had used a pistol, not a knife, when he committed the robbery.

In addition to the testimony of an investigating officer, repeating what appellant said in his series of statements, the state also presented a substantial amount of corroborating evidence. Appellant's uncle testified that on the Saturday before the crimes he returned to appellant a pistol which appellant had given him as security for a loan. At that time appellant discharged the gun in his uncle's yard. Later investigating officers searched the area where the gun was fired and recovered a spent shell. A firearms expert testified that this shell was fired from the same gun as the shells found near the victim's body.

A fingerprint specialist found appellant's prints inside the motel room where Sheila Porter was raped. The expert also found a print from the victim on an aluminum can found un-

der the seat of appellant's car. A fiber analyst testified that fibers matching those of the victim's clothes were found in Frank Smith's car.

The victim's body was examined not only by a pathologist but also by a serologist. The serologist testified that an examination of substances found in the vaginal area and on the underpants of the victim revealed the presence of semen in amounts indicating that sexual intercourse had occurred shortly before the victim's death. There was also testimony from a witness who testified that he visited appellant in jail and that appellant admitted that he participated in the multiple rape but denied that he killed the girl.

Having reviewed the record of the evidence establishing the above-recited facts, we find that the verdicts of guilt for robbery, kidnapping, rape, and first-degree murder are supported by competent, substantial evidence.

In his appeal, appellant raises questions concerning the constitutionality of the death penalty statute, the proper place of venue, the selection of jurors, the admission of his incriminating statements, a reference to unrelated criminal conduct, and the imposition of his sentences. We find that appellant has failed to establish any reversible error affecting his convictions. However, we do find that the trial court erred in imposing separate sentences for all three non-capital felonies in addition to the death sentence for the capital felony. Under the evidence, the first-degree murder rests on the felony mur-

der theory. Therefore there can be no separate sentence for the underlying felony. *State* v. *Hegstrom*, 401 So.2d 1343 (Fla. 1981).

Appellant argues that the death penalty statute is unconstitutional on the grounds that this Court does not review all first-degree murder cases, that the death penalty is cruel and unusual punishment, and that the capital felony sentencing law, as applied, denies equal protection to black defendants accused of killing white persons. All of these arguments have previously been considered and decided adversely to appellant's position. *See Proffitt* v. *Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); *Spinkellink* v. *Wainwright*, 578 F.2d 582 (5th Cir. 1978), *cert. denied*, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979); *Dobbert* v. *State*, 375 So.2d 1069 (Fla. 1979), *cert. denied*, 447 U.S. 912, 100 S.Ct. 3000, 64 L.Ed.2d 862 (1980).

Appellant argues that the exclusion from jury service on his case of all veniremen whose views on capital punishment were such as to preclude them from assuming the duties of a juror in a capital case as such cases are prosecuted under Florida law deprived him of the right to be tried by a jury representative of the community. This argument too has already been considered and rejected in previous decisions of this Court. *See Gafford* v. *State*, 387 So.2d 333 (Fla. 1980); *Downs* v. *State*, 386 So.2d 788 (Fla.), *cert. denied*, 449 U.S.

976, 101 S.Ct. 387, 66 L.Ed. 2d 238 (1980); *Riley* v. *State*, 366 So.2d 19 (Fla. 1978).

Before trial appellant filed an election of venue seeking to be tried in Leon County. He now argues that the trial court erred in denying his request. However, because the robbery and kidnapping occurred in Wakulla County and the rape, continued kidnapping, and murder occurred in Leon County, the cause could have been prosecuted in either county. § 910.05, Fla. Stat. (1977); *Barclay* v. *State*, 343 So.2d 1266 (Fla. 1977), *cert. denied*, 439 U.S. 892, 99 S.Ct. 249, 58 L. Ed.2d 237 (1978); *Crittendon* v. *State*, 388 So.2d 1088 (Fla. 1st DCA 1976).

Appellant also argues that venue should have been changed because of prejudicial pretrial publicity. Appellant filed a motion for change of venue prior to the commencement of the jury selection process and renewed the motion both after jury selection and at the close of the state's case. The trial judge denied the motion each time.

Appellant's motion was based on a showing that there was widespread public knowledge of the crimes throughout Wakulla County. Public knowledge alone, however, is not the focus of the inquiry on a motion for change of venue based on pretrial publicity. The critical factor is the extent of the prejudice, or lack of impartiality among potential jurors, that may accompany the knowledge. It has long escaped strict definition:

> Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula.

United States v. *Wood*, 299 U.S. 123, 145–46, 57 S.Ct. 177, 185, 81 L.Ed. 78 (1936). The question of jury partiality is one of mixed law and fact, requiring an appellate court to independently evaluate the voir dire testimony of impaneled jurors. *Irvin* v. *Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961); *Reynolds* v. *United States*, 8 Otto 145, 98 U.S. 145, 25 L.Ed. 244 (1878). The test for determining whether a change of venue is required was expressed in *Kelley* v. *State*, 212 So.2d 27, 28 (Fla. 2d DCA 1968), and adopted by this Court in *McCaskill* v. *State*, 344 So.2d 1276, 1278 (Fla. 1977):

> [W]hether the general state of mind of the inhabitants of a community is so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely upon the evidence presented in the courtroom.

In determining the extent of prejudice toward a defendant, one factor to consider is whether "it would be difficult for any individual to take an independent stand adverse to this strong community sentiment." *Manning* v. *State*, 378 So.2d 274, 276 (Fla. 1979). If it is possible to empanel a jury com-

prising persons who can be relied upon to decide the case based upon the evidence, and not be influenced by knowledge gained from sources outside the courtroom, then a denial of change of venue is proper. *See, e.g., Dobbert* v. *State*, 328 So.2d 433 (Fla. 1976), *aff'd*, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 166 (1977).

In the present case, the transcript of the jury selection proceedings reveals that every member of the jury panel had read or heard something about the crime. However, they all said that they would be able to disregard the previously gained information and render a verdict based on the evidence presented in court. Although such assurances are not dispositive, they support the presumption of a juror's impartiality. It is the defendant's burden "to demonstrate 'the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality.'" *Murphy* v. *Florida*, 421 U.S. 794, 800, 95 S.Ct. 2031, 2036, 44 L.Ed.2d 589 (1975) (quoting *Irvin* v. *Dowd*, 366 U.S. 717, 723, 81 S.Ct. 1639, 1642, 6 L. Ed.2d 751 (1961)).

In *Murphy* v. *Florida*, the United States Supreme Court said that a defendant might possibly raise a presumption of partiality by showing that the general atmosphere of the community is deeply hostile to him. Two ways to establish that such hostility exists are by showing that there was inflammatory publicity and by showing great difficulty in selecting a jury. Appellant here has failed to establish such hostility by either of these methods. As was the case in *Murphy*, the pre-

trial publicity here was largely factual, rather than emotional, in nature and mainly occurred around the time of the crime and the investigation, several months before the trial. Also as in *Murphy*, here there was no great difficulty in selecting a jury. In *Murphy* the Supreme Court noted that (in contrast with *Dowd* where 268 of 430 veniremen were excused because they were inclined to believe the accused guilty) only "20 of the 78 persons questioned were excused because they indicated an opinion as to the petitioner's guilt." 421 U.S. at 803, 95 S.Ct. at 2037, 44 L.Ed.2d 589. Similarly, in the present case only seventeen of the seventy potential jurors questioned were excused for possible bias either because they were related to the victim or because they had formed an opinion as to the defendant's guilt. The record shows that the trial judge was properly willing to excuse clearly prejudiced jurors for cause.

Appellant argues, however, that proof of a general atmosphere of hostility against him was established by testimony that the crimes were the main topic of conversation in the rural community of Wakulla County, citing *Manning* v. *State*, 378 So.2d 274 (Fla. 1979). Although we said in *Manning* that the size of a community is a factor to be considered in determining the prejudicial impact of intense publicity, we did not hold that it is the only factor. *Manning* should not be extended to require a change of venue in every highly publicized criminal prosecution in a rural community. In this case there was not shown the degree of community hostility toward the defendant that existed in *Manning*. We therefore conclude

that the trial judge did not abuse his discretion in denying the motion for change of venue. *See Straight* v. *State*, 397 So.2d 903 (Fla.), *cert. denied*, 454 U.S. 1022, 102 S.Ct. 556, 70 L. Ed.2d 418 (1981); *Jackson* v. *State*, 359 So.2d 1190 (Fla. 1978), *cert. denied*, 439 U.S. 1102, 99 S.Ct. 881, 59 L.Ed.2d 63 (1979).

Appellant's next argument is that the trial court erred in denying his motion to suppress the statements he gave to law enforcement officers prior to arrest. Appellant argues that the statements were coerced, were made during an unlawful detention, and were made without benefit of legal counsel. The record shows, however, that appellant willingly accompanied law enforcement officers to the Wakulla County sheriff's office to answer questions. After being advised of his constitutional rights with regard to the interview, appellant voluntarily made statements in response to the officers' questions. The record indicates that there was no impropriety in the interrogation of appellant. We therefore conclude that the court correctly denied the motion to suppress.

Appellant argues that the trial court erred in denying his motion for mistrial made when a police witness mentioned appellant's possible involvement in an unrelated robbery. The record shows that the comment in question was made by a state witness in response to a question asked on cross-examination by appellant's own attorney. The comment arose out of a series of questions reported as follows:

Q I believe somewhere in the statement on the 15th, you testified that Johnny Copeland told you that Smith was mad at him for pimping on him or getting him in trouble.

A That's correct.

Q All right, did you make any effort to verify whether or not that had occurred?

A That Mr. Copeland had told on Mr. Smith?

Q That's correct.

A Did I make any effort to do that?

Q Yes, sir.

A I don't understand what you mean, Mr. Davis.

Q Well, you just testified that you tried to verify portions of the statements or tried to run out facts and leads as they occurred to you, and when he told you that Smith was trying to set him up because he had pimped on him in the past, did you try to check that out?

A At the time that he made this particular statement, I was aware of the fact that Mr. Copeland, with Mr. Smith, had been in trouble before with basically

the same type crime of robbery of another convenience store.

Record on Appeal, vol. XI, at 1718–19. The defense moved for a mistrial. The state responded that the comment had been elicited by defense counsel's own question. Defense counsel argued that the answer was not responsive to the question, but the court ruled against him and denied the motion for mistrial. The trial court's ruling was correct. The reported colloquy shows that the witness, in response to defense counsel's question, was attempting to explain why Copeland may have believed that Smith was angry towards him. Since appellant's counsel opened the door to the damaging but objectionable reference by asking the question, appellant may not now seek reversal on the basis of that error. *McCrae* v. *State*, 395 So.2d 1145 (Fla. 1980), *cert. denied*, 454 U.S. 1041, 102 S.Ct. 583, 70 L.Ed.2d 486 (1981); *Jackson* v. *State*, 359 So.2d 1190 (Fla. 1978), *cert. denied*, 439 U.S. 1102, 99 S.Ct. 881, 59 L.Ed.2d 63 (1979).

We now consider appellant's objections to his sentences. His first argument is that he cannot be sentenced for both felony murder and the underlying felony. The indictment charged appellant with murder in the perpetration of felonious robbery and kidnapping. Either one of these two felonies, the commission of which were proven at trial, would support the conviction for first-degree murder. The felony relied upon to establish first-degree murder under the felony murder rule is a lesser included offense for purposes of section 775.021(4),

Florida Statutes (1977), as construed in *State* v. *Hegstrom*, 401 So.2d 1343 (Fla. 1981). The other felony is not a lesser included offense of the murder. The sentence for one of the felonies must be vacated under *Hegstrom*, but the other may stand. Since the kidnapping was more closely connected to the murder in time, we conclude that the kidnapping was the underlying felony upon which the felony murder conviction was based. Therefore we vacate the separate sentence for the crime of kidnapping.

Appellant also raises several challenges to his sentence of death. He argues that the trial court erred in its application of the aggravating and mitigating circumstances. The judge found that appellant had previously been convicted of felonies involving violence; that the murder was committed in connection with kidnapping and rape; that the murder was committed for the purpose of avoiding prosecution for robbery, kidnapping, and rape; that the murder was committed for pecuniary gain; and that the murder was especially heinous, atrocious, and cruel. The judge found that only one factor constituted a mitigating circumstance, appellant's age. The judge indicated that this factor was not entitled to much weight in light of the fact that appellant was mature enough to have served a term in state prison.

The circumstance of appellant having previously been convicted of felonies involving violence was supported by evidence of his previous convictions for armed robbery and was therefore properly considered. *Cooper* v. *State*, 336 So.2d 1133

(Fla. 1976), *cert. denied*, 431 U.S. 925, 97 S.Ct. 2200, 53 L. Ed.2d 239 (1977). The other four aggravating circumstances are also supported by evidence. However, these four factors are characteristics of the capital felony itself, rather than of the defendant, and therefore require further justification in view of the fact that appellant's liability rests upon the felony murder rule and not on evidence that he participated in premeditated murder.

The court found that the capital felony was committed in the course of committing the crimes of kidnapping and rape. Since the evidence shows that appellant was a principal in and fully participated in these crimes, this factor may be relied upon as an aggravating circumstance even though appellant's conviction for the capital felony itself is based on the felony murder theory. The court found that the murder was committed to avoid prosecution for the crimes already committed, robbery, kidnapping, and rape. *Stevens* v. *State*, 419 So.2d 1058 (Fla. 1982), *cert. denied*, 459 U.S. 1228, 103 S.Ct. 1236, 75 L.Ed.2d 469 (1983). We hold that this aggravating circumstance also may be imputed to appellant even though his liability for the murder itself is vicarious. The trial court held that the murder was committed for pecuniary gain. The evidence shows that the murder was the culmination of a course of events that began when appellant went into a store, robbed the clerk at gunpoint, and abducted her from the store. *Stevens* v. *State*. Therefore we hold that this pecuniary-gain feature of the murder may be imputed to appellant even though his

criminal liability for the murder itself rests on the felony murder theory. Finally, the trial court found that the capital felony was especially heinous, atrocious, or cruel. The validity of this aggravating factor rests not on the actual method of killing -- the victim was shot three times in the head with a pistol -- but rather on the additional acts setting this crime apart from the norm of capital felonies. *See State v. Dixon*, 283 So.2d 1 (Fla. 1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). Proof of such additional acts are provided by the evidence of the victim's hours-long ordeal from the time she initially encountered appellant to the time of her eventual execution. *E.g.*, *Jackson* v. *State*, 366 So.2d 752 (Fla. 1978), *cert. denied*, 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115 (1979); *Knight* v. *State*, 338 So.2d 201 (Fla. 1976). The evidence showed that appellant was an equal participant in the perpetration of these additional acts. Therefore this aggravating circumstance too may be applied to appellant even though his conviction for the capital felony itself is based on the felony murder rule.

Appellant argues that the capital felony sentencing law is unconstitutional because it allows a sentence of death without proof of intent to kill. In *Enmund* v. *Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), the United States Supreme Court held in a felony murder case that a sentence of death may not constitutionally be imposed in the absence of proof that the defendant killed, attempted to kill, intended to kill, contemplated that life would be taken, or anticipated that

lethal force would or might be used. *Id.* 102 S.Ct. at 3372, 3379. Although the evidence did not show that appellant shot the victim, his participation in the events leading up to the murder was substantial enough to support the conclusion that he contemplated that life would be taken or anticipated that lethal force would be used.

The trial judge found that the aggravating circumstances outweighed the single marginal mitigating consideration. The jury recommended a sentence of death. The aggravating circumstances found by the trial judge were all proper. With the case in this posture we conclude that the sentence of death is appropriate.

We affirm the convictions of first-degree murder, robbery, kidnapping, and sexual battery. The separate sentence for the crime of kidnapping is vacated. The sentence of death is affirmed.

It is so ordered.

BOYD, C.J., and ADKINS, ALDERMAN and EHRLICH, JJ., concur.

OVERTON, J., dissents with an opinion, in which McDONALD, J., concurs.

OVERTON, Justice, dissenting:

I must reluctantly dissent on the grounds that appellant was constitutionally entitled to a change of venue. This is clearly the type of hideous crime which not only justifies the

imposition of the death penalty, but also understandably arouses strong emotions against an individual charged with committing the offense. Although the result reached by the majority would be appropriate if the trial had been conducted in another county, I find there must be a retrial because appellant was constitutionally entitled to a change of venue under the law established both by the United States Supreme Court, *Irvin* v. *Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961), and by this Court in *Manning* v. *State*, 378 So.2d 274 (Fla. 1979). There is no logical way to reconcile the majority opinion in this case and *Manning*.

Deciding a motion for a change of venue is often the most difficult decision a trial judge must make in a well-publicized case. As the majority recognized, public knowledge of the crime alone is not the problem; the critical factor is the extent of the prejudice, bias, and hostility that may accompany that knowledge. The majority also discussed the test for a change of venue found in *McCaskill* v. *State*, 344 So.2d 1276 (Fla. 1977), and noted that, under *Manning*, one factor the trial court should consider in determining the extent of the prejudice toward a defendant is whether "it would be difficult for any individual to take an independent stand adverse to this strong community sentiment." 378 So.2d at 276. It is not determinative that all jurors disavowed any bias or prejudice or that appellant did not use all his peremptory challenges. What is required is that the court determine whether the community's knowledge of the case and the bias against the defen-

dant is such that it would be difficult, if not impossible, for a jury drawn from the community to disregard prior knowledge of the case and base its verdict exclusively on the evidence presented during trial. Every criminal defendant has the right to be tried by an impartial jury. This Court stated in *Manning:*

> Every reasonable precaution should be taken to preserve to a defendant trial by such a jury and to this end if there is reasonable basis shown for a change of venue a motion therefor properly made should be granted.
>
> A change of venue may sometimes inconvenience the State, yet we can see no way in which it can cause any real damage to it. On the other hand, granting a change of venue in a questionable case is certain to eliminate a possible error and eliminate a costly retrial if it be determined that the venue should have been changed.

378 So.2d at 277 (quoting from *Singer* v. *State*, 109 So.2d 7, 14 (Fla. 1959)).

In my opinion, the appellant demonstrated a constitutional basis for a change of venue. The facts in this case are almost identical to the facts in *Manning*, where we found such a high degree of knowledge and hostility in a rural community that the failure to change venue was reversible error. The voir dire in the instant case showed that every jury panel member had prior knowledge of the crimes through the media or community discussion. As in *Manning*, the crimes in this case occurred in a community where the incident received substan-

tially more attention and concern than if the same incident had occurred in a metropolitan area. Counsel for appellant presented unrefuted evidence of hostility in the community towards the appellant and his codefendants. The victim in this case was related to many residents of Wakulla County, and one prospective juror said that "it was impossible to stop and have coffee in this county for three or four weeks without hearing of it." There was considerable pre-trial publicity, including the anticipated testimony of key witnesses and the disclosure of incriminating statements made by appellant and his codefendants. I also note that Copeland's codefendant, Frank Smith, was granted a change of venue, tried in Jefferson County, and, after a mistrial, retried in Franklin County.

I cannot distinguish this case from *Manning* and find that the record clearly reflects sufficient hostility towards appellant and his codefendants to warrant a change of venue. The majority decision is inconsistent with *Manning* and creates disharmony in the law of this state. A lawyer or judge reading *Manning* and the majority opinion in this case would find it impossible to reconcile the two decisions and to determine what circumstances require a change of venue.

For the reasons expressed, I dissent and would remand for a new trial in a county other than Wakulla County.

McDONALD, J., concurs.

Appendix B

Copeland v. *Wainwright*, 505 So.2d 425 (Fla. 1987)

Johnny COPELAND, Petitioner,

v.

Louie L. WAINWRIGHT, Secretary of the Florida Department of Corrections, Respondent.

Johnny COPELAND, Appellant,

v.

STATE of Florida, Appellee.

Nos. 69428, 69482.

Supreme Court of Florida.

April 9, 1987.

Joyce Davis, Tallahassee, and Jay Topkis and Eric M. Freedman, of Paul, Weiss, Rifkind, Wharton & Garrison, New York City, for petitioner/appellant.

Robert A. Butterworth, Atty. Gen., and Mark C. Menser and Henri C. Cawthon, Asst. Attys. Gen., Tallahassee, for respondent/appellee.

PER CURIAM.

These proceedings are before the Court on a petition for habeas corpus and an appeal from the denial of a motion to vacate judgment and sentence. Petitioner is a state prisoner under sentence of death. The Governor of the State of Florida issued a warrant directing that the sentence be carried out. In connection with his petition and his appeal, petitioner sought a stay of the scheduled execution of sentence. This Court determined that it was not possible to give full and fair consideration to petitioner's claims on an expedited basis without granting a stay. Therefore we granted a stay of execution and directed the parties to file appellate briefs. Having carefully considered the briefs, we find that appellant's claims have no legal merit and therefore deny the petition for habeas corpus, affirm the denial of post-conviction relief, and dissolve the previously granted stay of execution.

On appeal of the trial court's summary denial of his motion for post-conviction relief, Copeland argues a number of issues. We will briefly address each one.

Appellant argues that he was denied the right to a fair trial by the denial of his motion for change of venue, which was grounded on allegations of prejudicial pretrial publicity and general community knowledge and prejudice. As this Court's opinion on Copeland's previous appeal clearly shows, this issue was argued there and decided. We upheld the judgment against this challenge. *Copeland* v. *State*, 457 So.2d 1012

(Fla. 1984), *cert. denied*, 471 U.S. 1030, 105 S.Ct. 2051, 85 L.Ed.2d 324 (1985). Matters that have been decided on an appeal from a previous judgment cannot be relitigated by motion for post-conviction relief under rule 3.850. *Johnson* v. *Wainwright*, 463 So.2d 207 (Fla. 1985); *O'Callaghan* v. *State*, 461 So.2d 1354 (Fla. 1984); *Foster* v. *State*, 400 So.2d 1 (Fla. 1981). Therefore the trial court's summary denial of this ground of the motion as procedurally barred was proper.

Appellant argues that the process by which he was sentenced to death was deficient under constitutional principles so that his sentence of death should be vacated for a new sentencing proceeding. He asserts that the jury that found him guilty and then recommended a sentence of death was not permitted to consider nonstatutory mitigating circumstances. The sentencing process, appellant argues, thus violated constitutional principles announced in *Lockett* v. *Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). Appellant relies on *Harvard* v. *State*, 486 So.2d 537 (Fla.), *cert. denied*, ___ U.S. ___, 107 S.Ct. 215, 93 L.Ed.2d 144 (1986), where this Court recognized that the Florida death penalty sentencing law could previously have been read to limit the consideration of mitigating factors to those circumstances listed in the statute. However, our *Harvard* decision makes clear that by the time of the decision in the case of *Songer* v. *State*, 365 So.2d 696 (Fla. 1978), *cert. denied*, 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed.2d 1060 (1979), the Florida statute had clearly been construed to permit consideration of nonstatutory mitigating cir-

cumstances, consistent with the dictates of *Lockett*. Thus, at the time of appellant's trial and sentencing, any confusion in the law had been resolved and the matter clarified. If defense counsel at trial had perceived any injury or prejudice in the instructions given to the jury concerning the consideration of mitigating circumstances, he could have raised the issue by appropriate motion, objection, or request for alternate instructions based on *Lockett* and *Songer*. Thus the argument that improperly restrictive instructions were given could have been raised at trial and, had no appropriate relief been given by the trial judge, argued on appeal. Matters that could have been raised on appeal are not proper grounds for relief by means of a rule 3.850 motion. *Maxwell* v. *Wainwright*, 490 So.2d 927 (Fla.), *cert. denied*, ___ U.S. ___, 107 S.Ct. 474, 93 L.Ed.2d 418 (1986); *Armstrong* v. *State*, 429 So.2d 287 (Fla.), *cert. denied*, 464 U.S. 865, 104 S.Ct. 203, 78 L.Ed.2d 177 (1983). Therefore the trial court was correct in summarily denying this ground of the motion as procedurally barred. Moreover, the record of the original trial shows that the defense was allowed to present evidence of mitigating factors not strictly related to any of the statutory list of mitigating circumstances. The reason there was no objection to the court's instruction based on the statutory list only is probably because the defense did not feel the jury was restricted or perceive any prejudice.

Next appellant argues that there were statements made by the judge and the prosecutor at the trial in the presence of

prospective jurors that tended to minimize the seriousness of the jury's role in capital sentencing in violation of constitutional principles as expressed in *Caldwell* v. *Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). There it was held that it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the real responsibility for determining whether the death sentence is proper rests elsewhere.

First we note that most of the judge's statements appellant refers to were not made as formal instructions to the jury that actually heard the case, but were informal comments made to the prospective jurors during the process of jury selection. The judge and the attorneys were trying to explain the two phases of the trial and the separate advisory sentencing determination the jury might be called upon to make if the defendant were found guilty of a capital offense. Defense counsel did not object to any of these comments on the ground that they erroneously minimized the importance of the jury's sentencing role. All the comments themselves, seen in proper context, were accurate. *See Spaziano* v. *State*, 433 So.2d 508 (Fla. 1983), *aff'd*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984).

Appellant argues that the lack of objection at trial and argument on appeal does not preclude consideration of the issue now because *Caldwell* v. *Mississippi* was a fundamental change in the constitutional law of capital sentencing thus creating a new legal right that may form the basis for post-con-

viction litigation. We find that this contention is without merit. The extreme importance of the jury's sentencing recommendation under our capital felony sentencing law has long been recognized, having emerged from early judicial construction of the statute. *McCaskill* v. *State*, 344 So.2d 1276 (Fla. 1977); *Chambers* v. *State*, 339 So.2d 204 (Fla. 1976); *Thompson* v. *State*, 328 So.2d 1 (Fla. 1976); *Tedder* v. *State*, 322 So.2d 908 (Fla. 1975); *Taylor* v. *State*, 294 So.2d 648 (Fla. 1974). Thus if defense counsel at trial had believed that the prosecutor and judge were denigrating the jury's role to his client's prejudice, he could have objected and received corrective action based on the well known *Tedder* rule. The matter could then have been argued on appeal in the absence of adequate corrective action by the trial court. The lack of objection at trial followed by argument on appeal constitutes a waiver of the objection. The trial court was correct in summarily denying this ground of the motion as procedurally barred.

Moreover, the record shows that the formal instructions given to the jury at the sentencing phase of the trial properly and adequately "stressed the significance of the jury's recommendation and the seriousness of the decision they were being asked to make." *Pope* v. *Wainwright*, 496 So.2d 798, 805 (Fla. 1986). Thus there was no *Caldwell* error committed at appellant's trial.

Next appellant argues that it was improper to sentence him to death under the principle announced in *Enmund* v. *Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982).

This argument was made in Copeland's previous appeal to this Court and was found to be without merit as we affirmed the death sentence against this challenge. *Copeland* v. *State*, 457 So.2d at 1019. As cases previously cited show, a motion for post-conviction relief cannot be used to reargue matters finally resolved in an earlier appeal. Thus this claim is not cognizable and was properly denied by the trial court in a summary fashion. The following brief discussion will demonstrate clearly that the matter has been previously determined and cannot be reconsidered even though appellant candidly seeks such reconsideration.

In *Enmund*, the United States Supreme Court held that a robbery accomplice who was not present at or directly involved in the murders, but who had been found guilty of first-degree murder under the felony-murder statute, could not be subjected to a death sentence "in the absence of proof that Enmund killed or attempted to kill, and regardless of whether Enmund intended or contemplated that life would be taken." *Enmund* v. *Florida*, 458 U.S. at 801, 102 S.Ct. at 3378-79. In responding to appellant's *Enmund* argument on the previous appeal, this Court said:

> Although the evidence did not show that appellant shot the victim, his participation in the events leading up to the murder was substantial enough to support the conclusion that he contemplated that life would be taken or anticipated that lethal force would be used.

Copeland v. *State*, 457 So.2d at 1019.

Petitioner argues that *Enmund* is only satisfied when there is direct proof of intent to kill and that in deciding the appeal we mischaracterized the facts of petitioner's participation in the murder. These arguments are without merit. *Enmund* requires proof that the defendant either killed, attempted to kill, intended to kill, "contemplated that life would be taken," 458 U.S. at 801, 102 S.Ct. at 3379, or "anticipated that lethal force would or might be used," 458 U.S. at 788, 102 S.Ct. at 3372. Our finding from the evidence that petitioner's participation in the acts preceding the murder was sufficient to satisfy the *Enmund* rule is not subject to reconsideration now. It was not based on mere inference of intent from the fact of participation in the underlying felonies, as suggested by petitioner. We noted petitioner's direct participation in the underlying felonies of robbery, kidnapping, and sexual battery. His "participation in the events leading up to the murder," 457 So.2d at 1019, taken together with the circumstances of the murder itself, proved that he contemplated or anticipated that the victim would be killed, distinguished the case from *Enmund* factually, and satisfied the *Enmund* rule. In applying the *Enmund* rule, the facts of *Enmund* should be kept in mind. *Enmund* was a getaway car driver, not present at the scene of the crimes, whose guilt of the underlying felony of robbery was based on his constructive presence. As an aider and abettor, he was a principal in the robbery under Florida law. Peti-

tioner here participated in the robbery, kidnapping, and sexual battery actively and directly, not constructively.

As authority for his argument, appellant relies upon the dissenting opinion in *State* v. *Tison*, 142 Ariz. 446, 690 P.2d 747 (1984), and notes that certiorari has been granted to review the decision of the Arizona Supreme Court there. *Tison* v. *Arizona*, ___ U.S. ___, 106 S.Ct. 1182, 89 L.Ed.2d 299 (1986) (granting certiorari). The dissenting opinion in question expresses the view that the evidence to satisfy the *Enmund* standard must be direct rather than circumstantial. The fact that the Arizona Supreme Court's decision there has been accepted for review is not a basis for us to revisit our determination that in this case the *Enmund* standard was met.

Next appellant argues that the statements he made to police authorities should not have been admitted into evidence against him at trial. Prior to trial he moved to suppress his statements on several grounds. On appeal, he argued that the refusal to suppress the statements was reversible error. This Court expressly rejected the arguments that there was coercion rendering the statements involuntary, that the statements were the product of an illegal arrest, and that they were obtained in violation of the right to counsel. *Copeland* v. *State*, 457 So.2d at 1017–18. Therefore these previously raised and rejected claims will not be reconsidered and are not before us now.

Appellant puts forth an additional ground for suppression of the statements, asserting that his defective mental condition at the time of the police interviews was such that his waivers of the right to remain silent and other rights were not knowing and intelligent waivers. Because this argument was not raised as a ground in support of the motion to suppress at trial, it was foreclosed as a ground for objecting to the use of the statements and is not properly before us. Moreover, the defective mental condition of the accused, even when clearly established in a timely manner in support of an effort to exclude statements, does not by itself render the statements involuntary within the meaning of the due process clause of the United States Constitution. *Colorado* v. *Connelly*, ___ U.S. ___, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986).

Appellant contends that his sentence of death is invalid on the ground that the death penalty in Florida is administered in an arbitrary and racially discriminatory manner. This argument was made on the previous appeal, as was the contention that appellant's death sentence threatens him with cruel and unusual punishment. Our rejection of these arguments finally settled these issues so they are not properly before us.

Appellant also argues that his convictions and sentence are invalid because he was incompetent to stand trial. It is argued that the trial court erroneously failed to hold a competency hearing, which should have been held because of indications calling appellant's competency into question. It should

be noted that although the trial court did not hold a formal adversarial hearing on competency, it did appoint a psychiatrist and two psychologists to examine appellant and make reports to the court. Based on these reports and the other information available, the court found appellant competent to stand trial.

Appellant argues that the findings of two mental health experts, a psychiatrist and a psychologist, who recently performed extensive evaluations of appellant, should be taken into consideration and support the conclusion that he was incompetent to stand trial. On the authority of *Card* v. *State*, 497 So.2d 1169 (Fla. 1986), and *James* v. *State*, 489 So.2d 737 (Fla.), *cert. denied*, ___ U.S. ___, 106 S.Ct. 3285, 91 L.Ed.2d 574 (1986), we reject this attempt to belatedly and retroactively establish that there was a lack of competency to stand trial.

In his habeas corpus petition, Copeland again presents three of the arguments made on appeal of the denial of his rule 3.850 motion: (1) that his death sentence violates *Enmund*; (2) that death sentences are imposed arbitrarily and based on racial discrimination; and (3) that the refusal to change venue deprived him of a fair trial. As we have already stated, all three issues were determined adversely to appellant's position when his convictions and sentences were affirmed on appeal. Relitigation of previously settled matters is no more permissible by habeas corpus than it is by motion for post-conviction relief. "Habeas corpus is not a vehicle for ob-

taining a second determination of matters previously decided on appeal." *Messer* v. *State*, 439 So.2d 875, 879 (Fla. 1983).

We affirm the denial of the rule 3.850 motion and deny the petition for writ of habeas corpus.

It is so ordered.

McDONALD, C.J., and OVERTON, EHRLICH and SHAW, JJ., concur.

BARKETT, J., concurs in result only.

Appendix C

Fla. Stat. § 921.141

921.141. *Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence*

(1) *Separate proceedings on issue of penalty.* -- Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life impris onment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded

a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) *Advisory sentence by the jury.* — After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) *Findings in support of sentence of death.* — Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the could shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) *Review of judgment and sentence.* -- The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) *Aggravating circumstances.* -- Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of law.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(6) *Mitigating circumstances.* -- Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

Editor's Note: The above is Fla. Stat. § 921.141 as it presently reads. In July 1979, it was amended. Fla. Laws, Ch. 79-353 (1979). Before July, 1979, subsections 2(b) and 3(b) read as follows:

2(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (6) which outweigh the aggravating circumstances found to exist; and

3(b) That there are insufficient mitigating circumstances as enumerated in subsection (6) to outweigh the aggravating circumstances.

Thus, Copeland's jury was instructed in May 1979, pursuant to this unamended statutory language.

Appendix D

Excerpts from Jury Instructions, *Songer* v. *State*, 365 So.2d 696 (Fla. 1978), *cert. denied*, 441 U.S. 956 (1979)

IN THE CIRCUIT COURT OF
THE NINTH JUDICIAL
CIRCUIT OF THE STATE OF FLORIDA,
IN AND FOR OSCEOLA COUNTY
OSCEOLA COUNTY CASE 74-27-CF-A-01
(CITRUS COUNTY CASE
74-49-CF-01)

STATE OF FLORIDA

-vs-

CARL RAY SONGER a/k/a
ROBERT BERRY

Defendant

TRANSCRIPT OF TRIAL
February 25, 26, 27, 28, 1974
VOLUME III

MR. GREEN: Nothing further.

MR. CONIGLIO: Nothing, your honor.

WHEREUPON, the witness was excused from the witness stand.

MR. GREEN: The State would offer no further evidence as to aggravating circumstances, your Honor.

THE COURT: Ladies and gentlemen of the jury, this trial is divided into two parts, as I have explained to you earlier. The first part ended with the entry of your verdict. The second part is concerned with the hearing on the testimony and evidence for the purpose of insuring the entry of a sentence which will be just in the light of the circumstances. In serving now, you act as advisors to the Court which has the final discretion and responsibility in this matter, with power of independent judgment.

Under these procedures it is now your duty to determine by majority vote whether or not you advise the imposition of the death penalty based upon:

One, whether sufficient aggravating circumstances as hereafter enumerated exist.

Two, whether sufficient mitigating circumstances exist, as hereinafter enumerated, which outweigh the aggravating circumstances found to exist, and

Three, based on these considerations, whether the defendant should be sentenced to life or death.

Aggravating circumstances are limited by statute to the following:

A) The capital felony was committed by a person under sentence of imprisonment.

B) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

C) The defendant knowingly created a great risk of death to many persons.

D) The capital felony was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit any rape, robbery, arson, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb.

E) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or affecting an escape from custody.

F) The capital felony was committed for pecuniary gain.

G) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of law.

Mitigating circumstances by statute are:

A) The defendant has no significant history or prior criminal activity.

B) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

C) The victim was participant in the defendant's conduct or consented to the act.

D) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

E) The defendant acted under extreme duress or under the substantial domination of another person.

F) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

G) The age of the defendant at the time of the crime.

H) The evidence introduced in this second phase of the trial.

Your determination must be made objectively without bias or prejudice, to the state or the defendant.

I have two forms of the advisory sentence which will be given to you along with these instructions which I have just read to you, the first advisory sentence is as follows:

We, the Jury, having heard the evidence under the sentencing procedure in the above case, as to whether aggravating circumstances which were so defined in the Court's charge, existed in the capital offense here involved, and whether sufficient mitigating circumstances are defined in the Court's charges to outweigh such aggravating circumstances, do find and advise that the mitigating circumstances do outweigh the aggravating circumstances. We therefore advise the Court that a life sentence should be imposed herein upon the defendant by the Court, dated this blank day of blank, 1974, and a place for the foreman to sign.

The other form of advisory sentence is as follows:

We, the Jury, having heard evidence under the sentencing procedure in the above case, as to whether aggravating circumstances which were so defined in the Court's charge, existed in the capital offense here involved and whether sufficient mitigating circumstances as defined in the Court's charge to outweigh such aggravating circumstances, do find and advise that the aggravating circumstances do outweigh the mitigating circumstances. We therefore advise the Court that a death sentence should be imposed herein upon the defendant by the Court, dated this blank day of blank, 1974, and a

place for the foreman to sign. Before proceeding further, Mr. Coniglio would you and Mr. Green approach the bench?

(AT THE BENCH: Mr. Coniglio and Mr. Green, court reporter –

THE COURT: In the chambers, we discussed the arguments to the jury, and both defense and the State waived argument to the jury, is that right?

MR. CONIGLIO: We waive, your Honor.

MR. GREEN: State waived, your Honor. Your Honor, I believe you failed to read (h) in the instructions, under the aggravating circumstances, or if you did, I failed to hear it, in any event, the State has no objections to this being omitted.

MR. CONIGLIO: No objections.

WHEREUPON, discussion at the bench ended)

THE COURT: Mr. Bailiff, if you would hand these instructions to the foreman and escort the jury to the jury room.

WHEREUPON, the jury was escorted to the jury room, 4:35 P.M.

WHEREUPON, the defendant was escorted to the holding room.

Appendix E

Declaration of Dorothy Otnow Lewis, M.D.

Declaration of Dorothy Otnow Lewis, M.D.

1. I am Dorothy Otnow Lewis, M.D., F.A.C.P., Professor of Psychiatry at New York University School of Medicine and Clinical Professor of Psychiatry at the Yale University Child Study Center. I am licensed in the states of New York, Connecticut and California. My credentials are set forth in the curriculum vitae attached hereto.

2. I submit this affidavit on behalf of Johnny Lee Copeland's petition to the Supreme Court of Florida.

3. Mr. Copeland was referred to me for psychiatric evaluation in order to address the following questions:

(a) What was Mr. Copeland's state of mind at the time of the crime?

b) What was Mr. Copeland's state of mind at the time of his arrest and interrogation, and his ability to understand the Miranda warnings and to waive his right to an attorney at that time?

(c) Was Mr. Copeland able to assist his counsel in the preparation of his case?

(d) Was Mr. Copeland able to understand the trial proceedings and testify in his own defense?

(e) Are there any facts which should have raised a substantial question regarding Mr. Copeland's competency to stand trial?

(f) Are there any additional facts available bearing on Mr. Copeland's mental state?

(g) Are there other clinical tests that should have been administered prior to or at the time of his trial to clarify his mental status at the time?

(h) Are there any tests that should now be conducted to elucidate his current mental status as well as his mental status at and around the time of the offense, his interrogation by the police, and his trial?

4. The findings presented here are based on the following sources of data:

(a) Interviews with Mr. Copeland on 11/12/86 at the Florida State Prison in Starke, Florida, which lasted for approximately five hours.

(b) A review of the following materials: a psychological report by Harry Krop, Ph.D., an affidavit of Annie Lee Williams, Mr. Copeland's mother, a psychiatric report of Dr. Robert Wray, a psychological report of Patrick Cook, Ph.D., a psychological report of Hugh Semon, Ph.D., some transcripts of the trial, and a Florida Supreme Court opinion regarding the case.

5. Let me begin by addressing the question of Mr. Copeland's state of mind at the time of the crime. I am unable at this time to respond to this question with any degree of medical certainty. In order to do so I would need to conduct a more extensive psychiatric evaluation. However, the fact

that Mr. Copeland was severely psychotic for an extended period subsequent to the crime of which he was convicted certainly raises the question of his mental status at the time of the crime.

Mr. Copeland also has a childhood history of severe mental illness, a fact of which Dr. Wray seems to have been unaware, but one which also raises the possibility that Mr. Copeland was significantly psychiatrically impaired at the time of the offense. For example, from early childhood on, Mr. Copeland believed people were talking about him behind his back. He felt he had to sit in the back of the classroom in order to keep his eye on everyone. He became isolated because he trusted no one. He episodically heard people talking but could not make out their words.

As he got older, he became aware of "presences" sitting beside him or behind him in his car. He once almost ran off the road trying to see them in his rear view mirror. His mother always considered him peculiar because he heard voices.

Thus, although it would be necessary for me to interview Mr. Copeland at greater length to try to determine his state of mind at the time of the crime, since there is evidence of psychotic thinking in childhood and adolescence, there is reason to suspect that he may have been mentally ill at the time of the offense.

6. I can address the question regarding Mr. Copeland's mental status at the time of his arrest and interrogation and his ability to understand the Miranda warnings and waive his right to an attorney.

Mr. Copeland is currently mentally retarded and was so at the time of his arrest. According to the psychological test results of Patrick Cook, Ph.D., Mr. Copeland has an I.Q. of 62. 1/ An I.Q. below 70 is indicative of significant retardation. Indeed, even an I.Q. of from 70 to 85 is indicative of borderline retardation. During my own interviews with Mr. Copeland, he was slow to comprehend simple questions. He was unable to think abstractly. For example, when I asked whether he ever did things he could not remember, he answered "no." Subsequently, when asked about specific incidents, he recalled several episodes when his girlfriend told him he had done things he did not recall having done. For example, he told of several episodes when she said he had dressed up as a woman with make-up, etc. which he did not recall.

Thus, were I to base my opinion on intellectual functioning alone, I would have to conclude that, at the time of his arrest, Mr. Copeland was not competent to understand the meaning or implications of the Miranda warning to waive his right to an attorney.

1/ Dr. Krop found his I.Q. to be closer to 69.

Another example of his impaired intellectual functioning was evident when I asked him to read a sign on the wall of the room in which we spoke. Although Mr. Copeland could read the words accurately, when I questioned him about what the words meant, he gave me a response that wholly distorted their true meaning. When I asked him to read the sign a second time, he still could not understand their meaning.

Mr. Copeland also evidenced signs of significant organic brain dysfunction during my interview with him. For example, he could not recall 4 digits backwards, he was entirely unable to subtract 7 from 100, and he could not recall 3 objects within a 5 minute period.

At another point in our interview, when I was testing for organic impairment by asking him to copy a simple figure, he struggled to do so, then suddenly lost control (as is common in some organically damaged individuals) and made a sudden slash across the page. He was also unable to draw a human figure and gave up after two attempts during which he became visibly frustrated and upset.

Mr. Copeland also was observed to have a dizzy episode during my interview with him. When I inquired about whether he ever experienced these episodes in the past, it became clear that they occurred frequently.

In addition, he has had one falling episode with loss of consciousness. He also has had peculiar episodes when he has been out of touch with his environment. According to him, his

mother had thought that he was on drugs during these episodes. Given his candor regarding drugs and alcohol, I believe his assertion that these spells occur spontaneously and are unrelated to drugs or alcohol. He has also had numerous episodes of loss of memory for nonviolent as well as for aggressive behaviors. This picture suggests that he may suffer from a seizure disorder as well as from brain damage.

Other factors further illustrate Mr. Copeland's impaired mental functioning at the time of his arrest and questioning. The most striking example is Mr. Copeland's initial account that a "masked man" had been a participant in the group that committed the crime. Those who previously evaluated Mr. Copeland, like the Florida Supreme Court in its 1984 opinion, appear to have believed that this was no more than a clumsy fabrication. Although such an immediately disprov able account would be just the kind that an individual like Mr. Copeland, who was both psychotic and functioning at the level of a young child, would invent if he were attempting to mislead, it has become quite clear in interviewing Mr. Copeland that this is not the explanation for the account that he gave.

Rather, the "masked man" to whom he referred was initially an imaginary companion to whom Mr. Copeland turned as a child when he was rejected by his mother. This figure became increasingly real over the years, and Mr. Copeland recounts many conversations with him since his childhood.

At the time of the crime Mr. Copeland still believed in the existence of this imaginary companion. His account of a "masked man" thus was not simply the fabrication of a child. Indeed, at the time, he believed that there was another person involved in the crime. It must be remembered that Mr. Copeland was recognized to be demonstrably psychotic shortly after the offense, and he was found incompetent to stand trial. Thus, the "masked man" was further indication of his intellectual limitations and his loss of touch with reality. Given the clear evidence of his impaired mental functioning, his condition should have been recognized by anyone who came in contact with him.

According to Dr. Wray, Mr. Copeland became psychotic at the time of the crime in question. It is my opinion that this psychosis extended throughout the trial.

Another extremely important factor bearing on Mr. Copeland's mental state at the time of his arrest is that he was extremely suggestible, as are many retarded individuals. For example, Mr. Copeland first told the investigating officers that the weapon used in the convenience store robbery was a knife. He subsequently said that it was a gun. When I asked Mr. Copeland why he changed his story, he replied, "The more they told me what happened and the more I saw in the newspaper, the more I remembered." It would seem that Mr. Copeland did not really recall the event clearly, but was quite

willing to agree with versions of the crime presented to him during questioning.

Hence, it is my conclusion that as a result of his impaired mental functioning and his psychosis, Mr. Copeland was not able to understand the meaning or implications of the Miranda warning or to waive his right to an attorney. Moreover, I conclude that Mr. Copeland's statements to the police were the product of his limited intellectual understanding, confusion about the actual facts, suggestibility and poor reality testing.

7. I shall address together the questions of whether Mr. Copeland was able to assist his attorneys in the preparation of his defense and whether he was competent to stand trial.

There is strong evidence from the materials (particularly in the transcript of Mr. Copeland's testimony at his trial) that Mr. Copeland was rambling and illogical during the trial. His testimony was incoherent, and he could not seem to think logically. We know that he was psychotic and incompetent to stand trial during the six months prior to his trial, and he was incoherent during his trial. There is no reason to believe that he had a brief lucid interval just before going to trial in which he could effectively assist his attorneys.

Mr. Copeland was recognized to be psychotic and he recalls that medication was put in his food during his months in jail prior to trial, medication which made him sleepy. He said

that he was not given pills because of his previous suicide attempts. During his time in jail, Mr. Copeland made two serious attempts to kill himself. During one attempt he ingested a large amount of shaving cream. During an even more bizarre and potentially lethal attempt, he put his mattress on the floor, stuffed the opening between the floor and the door with papers, and set fire to the mattress. He then, in response to an hallucinated voice giving the peculiar instruction "take the pressure" hanged himself and had to be cut down. According to him, he awakened to find people standing over him, trying to revive him. Thus, he lost consciousness, either from the trauma of hanging himself, or from the anoxia caused by the fumes from the fire.

I suspect his obviously incoherent and illogical testimony was the result of a combination of his psychotic condition and his intellectual limitations. According to Mr. Copeland, he also had access to liquor, marijuana and quaaludes during his trial, which alone or in combination with antipsychotic medication would have compromised further his ability to think clearly at the time.

It appears from Dr. Wray's report that, at the time of his trial, Mr. Copeland was receiving antipsychotic medication. This suggests that Dr. Wray recognized that Mr. Copeland was still psychotic. Of note, Mr. Copeland has no memory whatsoever of the guilt or punishment phases of the trial it-

self, which indicates that he was in an altered state during the trial.

Some of the information reported by Dr. Wray confirms the fact that just prior to his trial, when Dr. Wray saw him, Mr. Copeland was not able to give an adequate history. For example, Dr. Wray said that there was no previous history of "mental disease or psychotic tendencies." Dr. Wray also said that Mr. Copeland was a high school graduate. Neither of these statements is correct.

In fact, according to Mr. Copeland's mother, he was "peculiar" ever since a severe episode of poliomyelitis at age four years. Among his symptoms were "seeing things" and "hearing voices." In addition, Mr. Copeland dropped out of school, which he had attended very irregularly in any event, in the middle of eighth grade.

Dr. Wray also reported that Mr. Copeland had been raised in a middle class family. According to the materials, Mr. Copeland was raised in poverty, was malnourished, was severely beaten as a child, and witnessed extreme abuse. It would seem that Mr. Copeland, prior to his trial, was unable to produce an accurate psychiatric history. Such a history was essential to a reliable understanding of Mr. Copeland's present psychological status, and could have turned up relevant mitigating information for use at his trial. Thus, Mr. Copeland was unable to provide accurate information that might have helped him in his defense.

In short, Mr. Copeland lacked the ability to consult with his lawyer with a rational degree of understanding and lacked a rational and factual understanding of the proceedings against him.

It is puzzling, given the number of interviews that Dr. Wray had with Mr. Copeland, that he did not recognize that Mr. Copeland was brain damaged. There is no indication that Dr. Wray even performed a formal mental status examination of Mr. Copeland. Had he done so, he would have been able to document Mr. Copeland's organic brain dysfunction, impaired short and long-term memory, inability to reason logically, poor judgment, and severe intellectual limitations.

Dr. Semon's conclusion that Mr. Copeland was competent to stand trial is hard to understand, given the brevity of his interview with Mr. Copeland and Mr. Copeland's behavior during that interview. According to Dr. Semon, he saw Mr. Copeland for only one hour. During that hour, Mr. Copeland's behavior appeared "very bizarre." Dr. Semon concluded that, because Mr. Copeland's behavior was so bizarre, it had to be an act. Dr. Semon made this judgment in spite of the fact that during the interview Mr. Copeland "remained virtually verbally noncommunicative." He thus made no effort to ascertain Mr. Copeland's understanding of the upcoming judicial proceedings or his ability to consult rationally with his attorneys.

Dr. Cook observed that Mr. Copeland "appeared not to understand even simple questions." He also determined that Mr. Copeland was retarded. He may have underestimated the degree of Mr. Copeland's retardation because he relied only on a verbal I.Q. of 69. Had he performed the second half of the I.Q. test -- the Performance Section, which taps perceptual motor skills, spatial relations, and other tests of brain function before he came to his original conclusion, he might have recognized the severity of Mr. Copeland's limitations. Unfortunately, he did not perform this essential part of the testing until he had already presented his conclusion to the court. This testing revealed a Performance I.Q. of 59, a score indicative of far greater retardation than had previously been recognized. I suspect that a careful analysis of the subtest scores of this Performance section would have revealed brain damage as well as retardation.

Dr. Cook also noted Mr. Copeland's inappropriate, child-like behavior during the testing (e.g. "sprawl[ing] on the floor"). That Mr. Copeland was not putting on an act is illustrated by the fact that he told Dr. Cook that he had finished the 11th grade, thus exaggerating his accomplishments in order to appear competent. In reality he only completed the seventh grade.

Dr. Cook also stated that he "could not rule out the possibility that Mr. Copeland is schizophrenic" although he did not consider him, at the time, to be "grossly psychotic."

Given Dr. Cook's own finding that Mr. Copeland was retarded, "appeared not to understand even simple questions," and may have been "schizophrenic," it is impossible to understand how he could have concluded that Mr. Copeland was competent to stand trial, since competency rests on the individual's ability to understand and appreciate fairly complex questions.

Both Dr. Semon and Dr. Cook imply that Mr. Copeland may not have been fully cooperative with their testing and, indeed, may have been trying to skew the results downward. I find this interpretation of Mr. Copeland's behavior extremely implausible for at least three reasons. First, I find it highly unlikely that Mr. Copeland has the mental ability to formulate and implement a plan to fake his test results. Second, this hypothesis is inconsistent with reliable other evidence of Mr. Copeland's behavior and character. Both Dr. Wray and I found that Mr. Copeland was completely cooperative with all aspects of our lengthy examinations and tried hard to provide all the information and perform every task that we requested. This is in keeping with Mr. Copeland's deep-rooted desire to attempt to please authority figures. Third, the results that Dr. Cook obtained in his testing, at a time when Mr. Copeland reportedly had the ability to recognize and read (although not necessarily understand) words at the second grade level, and the results that Dr. Wray obtained seven years later, at a time when Mr. Copeland was able to read at a fourth grade level and spell at a sixth grade level, are extremely close. Dr. Cook

reported an overall I.Q. of 62 in 1979, and Dr. Wray found an overall I.Q. of 69 in 1986.

Based on the following factors: (a) Mr. Copeland's significant retardation, (b) his inability to understand simple questions, (c) his history of severe head injuries and his evidence on examination of significant brain damage, (d) his long-standing history of psychosis, (e) his illogical, incoherent ramblings on the witness stand, it is my conclusion that Mr. Copeland lacked the ability to consult with his lawyer with a rational degree of understanding, and lacked a rational and factual understanding of the proceedings against him.

8. In response to the question of whether there were factors that should have called into question Mr. Copeland's ability to stand trial, let me list the following:

(a) Mr. Copeland's mental retardation and well documented inability to "understand even simple questions" should have raised the question of his competency to stand trial.

(b) Mr. Copeland's psychotic behavior during interviews with the psychologists appointed to assess his mental status, his floridly psychotic condition during the months subsequent to the offense, and his bizarre but serious suicide attempts during his pretrial incarceration should have raised the question of his competence to stand trial.

These factors alone were sufficient to raise a doubt as to Mr. Copeland's competency to stand trial.

Had the trial judge heeded these warning signals and directed the in-depth inquiry that they called for, he would have found additional material calling into question Mr. Copeland's competency to stand trial. As noted, this additional material included:

(a) Mr. Copeland's long history of severe psychopathology since childhood.

(b) Mr. Copeland's history of severe central nervous system trauma including polio at approximately age four years, and at least two serious car accidents in which he sustained severe head injuries, coupled with clear evidence of organic brain dysfunction.

9. Are there any additional facts available bearing on Mr. Copeland's mental state?

At this time, I am aware of the following additional material of particular importance:

(a) Mr. Copeland's retardation made him unable to envision the consequences that might result from participation in a robbery. Nor could he anticipate that a sexual assault might lead to further violence. His retardation also made him more susceptible to the influence of others, especially those he looked up to and admired. In this regard, it is plain to me that Mr. Copeland idolized his codefendant, Frank Smith, and lacked the capacity to think independently when in Mr. Smith's company.

(b) Mr. Copeland's long history of ongoing, severe mental illness starting in childhood also impaired his

judgment, in particular his ability to foresee the consequences of particular acts, as well as his ability to appreciate the criminality of his behavior, and his ability to control his behavior.

(c) Mr. Copeland's brain damage similarly impaired his judgment and his ability to control his acts.

(d) In addition to the above factors, Mr. Copeland was the victim of extraordinary physical abuse, mostly at the hands of his mother who tied him to the bed and beat him mercilessly. The scars from these beatings are still clearly visible today all over his back. Moreover, his entire upbringing took place in an environment of extraordinary violence; his father and his stepfather regularly beat his mother in his presence.

(e) Mr. Copeland was also the victim of sexual abuse by his uncle when he was a child of about six years. His uncle tied him up, removed his clothes, and tried to penetrate him anally. Mr. Copeland was also sexually assaulted by his biological father during his adolescence. Degrading sexual experiences such as these are often powerful influences in later behavior, and their influence is still greater in individuals with brain damage and/or psychosis.

10. What further tests or evaluations should have been conducted prior to Mr. Copeland's trial and should be conducted now?

(a) Mr. Copeland should have received and still should receive a comprehensive neurological examination. The numerous scars on his head and face, his history of several severe head injuries and his history of a severe neurological illness (polio), and his perceptual motor and memory impairment on psychological testing attest to a history of injury to his brain which requires further assessment by a neurologist. Such basic things as assessments of sensory and motor function, coordination, intactness of the cranial nerves, etc. have never been performed.

(b) Mr. Copeland's strong family history of epilepsy, his history of blackouts, one falling episode, dizzy spells, peculiar sensations (e.g., sounds becoming louder), and episodes of impaired memory for nonviolent as well as aggressive acts indicate that an electroencephalogram with photic stimulation and hyperventilation should be performed. In addition to his organic dysfunction, he may also suffer from a seizure disorder.

(c) Mr. Copeland should have Nuclear Magnetic Resonance (NMR) imaging of his brain which might document graphically what to date is documented clinically. If that is not possible, a CAT scan of the brain should be performed.

(d) Neuropsychological testing (I recommend the Halstead-Reitan Battery) would document further the extent of his brain damage.

(e) Educational testing should be conducted to determine the nature and extent of Mr. Copeland's

learning disabilities. This information would help us understand more about his ability to comprehend the trial proceedings.

(f) Needless to say, a more comprehensive psychiatric evaluation, including interviews with a competent relative of Mr. Copeland would be desirable. Mr. Copeland's mother, at least, should have been, and still should be interviewed to determine his psychiatric and medical history. A detailed family history from his mother would also help to clarify the existence of mental illness in other family members, and to document any other history of physical or sexual abuse.

Pursuant to 28 U.S.C. § 1746, I declare under penalties of perjury that the foregoing is true and correct.

Dated: November 15, 1986

Dorothy Otnow Lewis, M.D.

Supreme Court, U.S.
FILED
JUL 24 1987
JOSEPH F. SPANIOL, JR.
CLERK

87-161

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1986

JOHNNY COPELAND,

Petitioner

- v. -

RICHARD L. DUGGER,
Secretary, Department of Corrections
and
STATE OF FLORIDA,

Respondents.

BRIEF OF RESPONDENTS

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ATTORNEY GENERAL

MARK C. MENSER
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COUNSEL FOR RESPONDENT

QUESTIONS PRESENTED

WHETHER CERTIORARI SHOULD BE GRANTED TO ADDRESS THE APPLICABILITY OF WAINWRIGHT V. SYKES, 433 U.S. 72 (1977) AND ENGLE V. ISAAC, 456 U.S. 107 (1982) TO CLAIMS OF SENTENCING ERROR FOUNDED UPON THIS COURT'S DECISION IN HITCHCOCK V. DUGGER, _____ U.S. _____, 107 S.Ct. 1826 (1987)

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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1986

JOHNNY COPELAND,

Petitioner

- v. -

RICHARD L. DUGGER,
Secretary, Department of Corrections
and
STATE OF FLORIDA,

Respondents.

BRIEF OF RESPONDENTS

The Respondents submit that the petition for writ of certiorari should be granted as argued herein.

OPINIONS BELOW

The Petitioner's statement is accepted.

JURISDICTION

The Petitioner's statement is accepted.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petitioner's statement is accepted. The State of Florida would additionally note:

Amendment V of the Constitution of the United States:

> No persons shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law nor

shall private property be taken for public use without just compensation.

Amendment X states:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the State, are reserved to the States respectively, or to the people."

Amendment XIV provides, inter alia:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

STATEMENT OF THE CASE

Johnny Copeland, with two accomplices (Smith and Hall) abducted, raped and murdered nineteen year old Sheila Porter, two weeks before Christmas.

Copeland was not the poor, almost retarded black victim of racist prosecution represented in his petition. His low I.Q. score was attributed to his deliberate faking of his tests by two examining psychiatrists (Dr. Senior and Dr. Cook). A third expert, Dr. Wray, found Copeland to have been sane and competent during his crimes. Further belying Copeland's claim of low intelligence was his successful employment as a skilled brickmason, earning a substantial salary and living (including paying his bills, etc.) quite normally. Copeland even filed some sworn (verified) and pro se pleadings.

Copeland was tried in his home county of Wakulla, Florida. At a special hearing

on venue (due to publicity) the media representatives testified to reporting known facts about the case while avoiding editorials or judgmental pieces. Potential jurors were screened to remove any who would be affected by racial factors. There is no question that Copeland received a fair trial.

Prior to trial, and belying the claim that "Hitchcock" claims could not have been raised in 1979, defense counsel moved the court to declare the death penalty unconstitutional if nonstatutory mitigating factors could not be argued to the sentencer. (R 166) In doing so, defense counsel argued that decisions in "Lockett", "Cooper" and "Songer" had already established Copeland's right to argue these factors to the jury. (R 166-167) The State did not challenge Copeland's right to argue this evidence and, at the sentencing phase, all desired nonstatutory mitigating

evidence was presented and argued to the jury.

The issue of "jury instructions" was not preserved by objection or raised on appeal, obviously because any "error" was harmless, if even extant.

Copeland has chosen to withhold these facts from this Honorable Court in favor of racial hyperbole.

Copeland raised the claim regarding the jury instruction in a motion for post conviction relief filed just prior to his scheduled execution. The issue was rejected by the Circuit Court and the Florida Supreme Court as procedurally barred.

Another issue relating to the admissibility of statements given by Copeland is available for certiorari but is being consciously withheld (see petition, page 6) for abusive federal habeas corpus (piecemeal) litigation.

REASONS FOR GRANTING THE WRIT

This Honorable Court's recent decision in Hitchcock v. Dugger, ____ U.S. ____, 107 S.Ct. 1821 (1987) noted the existence of two questions which were to be answered at another time. First, this Court recognized that the question of the applicability of any "procedural bar" under Wainwright v. Sykes, 433 U.S. 72 (1977) and Engle v. Isaac, 456 U.S. 107 (1982) remains unresolved. Second, the Court has noted that the issue of "harmless error" was not answered.

The resolution of these questions is necessary so that the scope of Hitchcock can be defined. While Mr. Copeland suggests that only "eight" inmates on Florida's death row are potentially affected, the State notes that "Hitchcock" claims are now being filed by every inmate sentenced prior to 1979, and even some sentenced after 1980.

This case is an excellent vehicle for addressing both claims. The "procedural bar" issue is patently ripe for review. Regardless of Copeland's claims of "confusion," Copeland himself was aware of the legal issue (as manifested by his pretrial pleadings) yet he did not raise it on direct appeal. Instead, Copeland rasied the claims in a (now de rigeur) eleventh hour collateral attack. The Florida Supreme Court rejected the claim as procedurally barred (not "waived"), thus preserving the issue for certiorari review.

Should the procedural bar invoked by the State not be deemed applicable, the record still supports a defense of "harmless error." Copeland asserted, pretrial, his right to present and argue "nonstatutory mitgating evidence." The State did not oppose him and the Court did not obstruct him. At sentencing, nonstatutory factors including "residual doubt

about guilt" were presented to the advisory jury and the sentencer. Copeland's attorney obviously did not feel "restricted" by the Court's decision to give the contested instruction, which was neither objected to nor appealed. No evidence exists to support the representation that either the judge or the jury felt they could not consider the evidence. Thus, the issue of harmless error reserved for future review in Hitchcock, supra, is indeed available here.

CONCLUSION

The case at bar offers the same rational and legal bases for granting certiorari as Hitchcock, while presenting two questions which Hitchcock could not answer, though noting that answers would be necessary. Thus, Florida agrees with Mr. Copeland that certiorari should be granted.

Respectfully submitted,

ROBERT A. BUTTERWORTH
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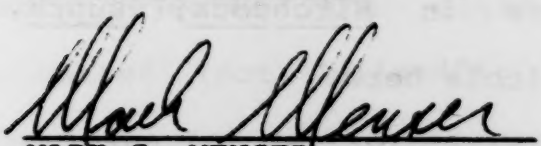

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CERTIFICATE OF SERVICE

I, MARK C. MENSER, do hereby certify that I am a member of the Bar of the Supreme Court of the United States, and that I have served a copy of the Response To Petition For Writ of Certiorari To The Supreme Court of Florida, Brief for Respondent in Opposition, by depositing same in the United States mail, first class postage prepaid, as follows:

RICHARD A. ROSEN
PAUL, WEISS, RIFKIND,
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All parties required to be served have been served on this _____ day of July, 1987.

_____
MARK C. MENSER
Assistant Attorney General

No. 87-161

Supreme Court, U.S.
FILED
SEP 14 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
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and

STATE OF FLORIDA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PETITIONER'S REPLY MEMORANDUM

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OCTOBER TERM, 1987

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RICHARD L. DUGGER,

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PETITIONER'S REPLY MEMORANDUM

The "Brief of Respondents" filed in the above-captioned matter in response to Copeland's petition for certiorari urges the Court to grant certiorari in this case, but upon grounds wholly different from those urged in the petition. Thus, the "Brief of Respondents" is in reality an

untimely and improper cross-petition for certiorari. It seeks an advisory opinion, since the result below would not alter if the Court granted the cross-petition and sustained the respondents' position. In any event, this case is not an appropriate one for the resolution of those questions, which were never addressed by the State courts below.

I.

RESPONDENTS' IMPROPER CROSS-PETITION FOR CERTIORARI MUST BE DISMISSED

Rule 22.1 of the Rules of the Supreme Court of the United States requires that a brief in opposition to the petition for certiorari should "disclos[e] any matter or ground why the cause should not be reviewed by this Court." The "Brief of Respondents," however, advances no reason why Copeland's petition for certiorari should be denied.

Instead, the "Brief of Respondents" urges this Court to grant certiorari to review, not the questions presented in Copeland's petition, but two wholly different questions not "set forth in the petition or fairly included therein." Rule 21.1(a). The "Brief of Respondents" should therefore be treated as a cross-petition for certiorari.

The cross-petition was filed on July 23, 1987, 107 days after the judgment of the Supreme Court of Florida. It is therefore untimely under Rule 20, unless it may be treated as having been properly filed under Rule 19.5.

Rule 19.5 allows a cross-petition for certiorari to be filed not more than 30 days after receipt of the petition for certiorari, but only if the cross-petitioner complies with the provisions of the Rule. The cross-petitioner must "enter an appearance, pay the docket fee, and file, with proof of service as prescribed by Rule 28, 40 copies of a cross-petition for certiorari, which shall comply in all respects with the provisions of Rule 21."

Respondents did none of these things. Instead, they filed their cross-petition in the formal guise of a brief in opposition to Copeland's petition for certiorari. Therefore, they cannot be deemed to have filed under Rule 19.5. Their cross-petition for certiorari should be dismissed as untimely.

II.

THE CROSS-PETITION SEEKS AN ADVISORY OPINION

The two questions that the cross-petition urges this Court to decide are not properly presented by the facts of this case. They were not raised by the parties nor

passed upon by the Florida Supreme Court in its decision below.

Furthermore, the resolution of these questions would not determine the validity of the judgment below. Copeland's conviction -- which he has now collaterally attacked in the Florida state courts and with respect to which he has sought review by this Court -- was affirmed. Thus, the cross-petition is no more than a request that this Court provide an advisory opinion concerning the two legal theories that the cross-petition has suggested as alternative grounds for the decision below. Such advisory opinions are, of course, forbidden by Article III. *See Flast* v. *Cohen*, 392 U.S. 83, 94-95 (1968); *Herb* v. *Pitcairn*, 324 U.S. 117, 126 (1945).

III.

NEITHER OF THE QUESTIONS PRESENTED IN THE CROSS-PETITION IS WORTHY OF CERTIORARI REVIEW

Wainwright v. *Sykes* **and** *Engle v. Isaac* **are inapplicable.**

Respondents request the Court to determine "the applicability of *Wainwright* v. *Sykes*, 433 U.S. 72 (1977) and *Engle* v. *Issac*, 456 U.S. 107 (1982) to claims of sentencing error founded upon this court's decision in *Hitchcock* v. *Dugger*, ____ U.S. ____, 107 S. Ct. 1826 (1987)." This case is not an appropriate one for the reso-

lution of that question. *Sykes* and *Engle* concern the applicability of state procedural bars to claims raised in *federal* habeas corpus actions. This case, however, does not concern a federal habeas corpus action. Copeland instead is seeking a writ of certiorari to the Florida Supreme Court for review of its denial of relief in *state* post-conviction proceedings. *Sykes* and *Engle* are therefore simply inapposite.

The error in this case cannot be harmless.

Respondents have urged that this case is an appropriate vehicle to determine whether claims under this Court's recent *Hitchcock* decision are subject to harmless error analysis.

Again, however, the facts of this case do not present the proper context for deciding that question. Even assuming that *Hitchcock* claims are subject to harmless error analysis, respondents could not possibly meet the burden of showing that the error in this case was harmless. As discussed in Copeland's petition, extensive mitigating evidence was not presented to the jury. Moreover, the instructions given to the jury precluded them from considering the non-statutory mitigating evidence that was presented (a fact respondents conspicuously ignore). Nonetheless, two of twelve jurors recommended that the death sentence not be imposed. Respondents sim-

ply cannot show beyond a reasonable doubt that if the jury had been permitted to consider the evidence of other mitigating circumstances -- such as mental retardation, psychological disturbance, and drug abuse -- a majority would not have voted for a life sentence.

Conclusion

For these reasons, Copeland's petition for certiorari should be granted and the cross-petition for certiorari should be denied.

Respectfully submitted,

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